

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RITA C. DOWELL,

Plaintiff,

v.

HAPO COMMUNITY CREDIT UNION,
a Washington Corporation,
RANDY LUCHSINGER, and JANE
DOE LUCHSINGER, DAVID SCHULTZ
AND JANE DOE SCHULTZ,

Defendants.

NO. CV-04-5098-EFS

**ORDER HOLDING IN ABEYANCE IN
PART, GRANTING IN PART, AND
DENYING IN PART, DEFENDANTS'
MOTION FOR A PROTECTIVE ORDER.**

Before the Court is Defendants' Motion for a Protective Order. (Ct. Rec. 60.) Defendants Motion seeks orders: (1) Barring any Further Electronic Discovery; (2) Requiring Dowell to Finance any Further Electronic Discovery, if any; (3) Barring Dowell from Making Further Non-Electronic Discovery Requests Unless the Request Constitutes a Legitimate Follow Up from Deposition Testimony; and (4) Barring Dowell from Arguing or Asserting that Defendants have Spoiled Evidence. The Court has reviewed the parties' memoranda and supporting attachments and is fully informed. For the reasons stated herein, the Defendants' motion for a Protective Order is HELD IN ABEYANCE IN PART, GRANTED IN PART, and DENIED IN PART. Specifically, Defendants' request

1 for orders one (1), two (2), and three (3) are GRANTED, while request
2 four (4) is DENIED.

3 **I. BACKGROUND**

4 Defendant HAPO Community Credit Union ("HAPO"), Randy Luchsinger
5 and David Schultz filed a Motion for a Protective Order to prohibit
6 Plaintiff Dowell from seeking any future electronic discovery. (In
7 addition, HAPO filed a substantially similar Motion for Protective
8 Order in the cases of Danny Mac (CV-04-5110-EFS) and Ray Martin (CV-
9 04-5109-EFS)). Plaintiff Dowell filed suit on August 17, 2004, against
10 HAPO, Randy Luchsinger, and David Schultz alleging sexual, age, and
11 retaliatory discrimination. (Ct. Rec. 1.) Soon after Plaintiff filed
12 the instant suit, she received information regarding HAPO's alleged
13 destruction of documents related to the instant case. (Ct. Rec. 24 at
14 1-2.) Accordingly, the Court signed a Stipulated Order for the
15 Preservation of Documents and Other Discovery Matters on October, 18,
16 2004, and Plaintiff paid \$10,000 to preserve a copy of HAPO's hard
17 drive. (Ct. Recs. 30 & 46-2 at 35.)

18 Plaintiff Dowell requested discovery of files contained on HAPO
19 hard drives relating to her employment discrimination claim. On April
20 11, 2005, the Court signed a Stipulated Order Regarding Protocol for
21 Electronic Discovery. (Ct. Rec. 42.) Both parties compromised to
22 establish a workable electronic discovery plan using "keyword"
23 searches of HAPO's hard drive. The parties trimmed Dowell's original
24 request for 164 search terms to fifty (50) words. (Ct. Rec. 30)

25 On May 1, 2005 HAPO's computer search expert, Mr. Gordon Mitchell
26 conducted a search of HAPO's hard drive. (Ct. Rec. 76-2.) As stated in

1 the Stipulated Electronic Discovery Protocol, the parties agreed that
2 keywords producing more than 500 hits would not be evaluated. (Ct.
3 Rec. 42.) Of the fifty (50) search terms, thirty-three (33) had hits,
4 (Ct. Rec. 76-2.), while two words, "tournament" and "golf" were
5 estimated to produce over 500 hits. Mr. Mitchell turned over 2300
6 documents to defense counsel for these thirty-three search terms. (Ct.
7 Rec. 76-2.) On June 10, 2005, Defense counsel turned over 1100 pages
8 corresponding to thirteen (13) search terms to Plaintiff. (Ct. Rec.
9 76-2.) Defendants anticipate Plaintiff will seek further electronic
10 discovery and are especially weary of Plaintiff's continuing
11 suggestions that HAPO turn over the hard drive to Plaintiff's expert.
12 Accordingly, Defendants seek a protective order to prohibit Plaintiff
13 from seeking further electronic discovery.

14 **1. Further Electronic Discovery**

15 Under the Federal Rules of Civil Procedure, the Court may issue a
16 protective order for "good cause shown," to protect a person or party
17 from "annoyance, embarrassment, oppression, or undue burden or
18 expense," when justice so requires. Fed. R. Civ. P. 26(c). The
19 Defendants argue further electronic discovery will present HAPO with
20 an undue burden. When determining whether "good cause" exists for a
21 protective order, a court must balance the need for discovery against
22 the burdens such discovery places on the parties. See *Wood v. McEwen*,
23 644 F.2d 797, 801 (9th Cir. 1981). The requesting party bears the
24 burden of demonstrating to the Court the specific harm that will occur
25 if discovery is not limited. *Phillips v. Gen. Motors*, 307 F.3d 1206,
26 1210-11 (9th Cir. 2002).

1 Typically the party seeking discovery is not allowed free access
2 to the opposing party's hard drive. *See In re Ford Motor Co.*, 345 F.3d
3 1315, 1317 (11th Cir. 2003). Such a process might allow the opposing
4 party to have access to trade secrets and privileged attorney client
5 information. Accordingly, Plaintiff's expert shall not have access to
6 Defendants' hard drive absent a showing of evidence necessitating such
7 access.

8 In the case at hand, the Defendants worked with the Plaintiffs to
9 substantially produce the results contemplated by the Stipulated
10 Electronic Discovery Protocol. The parties agreed on an targeted
11 keyword search to both increase the chance of finding responsive
12 documents and decrease the Defendants' burden associated with
13 producing such documents.

14 The Defendants have already produced 1100 electronic discovery
15 documents at a cost of \$23,000. (**Ct. Rec. 63 at 12.**) In addition,
16 counsel for Defendants spent a significant amount of time preparing
17 for the search and drafting the Stipulated Electronic Discovery
18 Protocol. (Ct Rec. 63 at 12.) Consequently, the Court finds that the
19 Defendants have shown "good cause" regarding the undue burden
20 associated with further electronic discovery.

21 However, the Court's Order Prohibiting Further Electronic
22 Discovery is contingent on the conditions described below. First, the
23 Court orders Defendants to file a declaration explaining why the words
24 "tournament" and "golf" were stopped before 500 "hits" was reached. In
25 addition, Defendants are ordered to explain why they used an
26 "individual hit" method in estimating whether a word would receive 500

1 hits. Although the Stipulated Electronic Discovery Protocol mandates
2 that only words receiving less than 500 "hits" be produced, it appears
3 that there is some confusion over the word "hits." For example, Mr.
4 Mitchell stated he stopped the search for the word "tournament"
5 because there were 400 documents averaging two or more hits each, thus
6 providing an estimate of 800 hits. (Cr. Rec. 67-2.) Such a procedure
7 for examining hits would allow one document with the word tournament
8 repeated several times over to influence the total hit count, even
9 though only one document need be examined. Mr. Richard Haugen, the
10 Plaintiff's expert, describes this discrepancy between "individual
11 hits" and "hits within a document" in his declaration. (Ct. Rec. 75 at
12 2).

13 Second, the Court orders Defendants to produce a list of
14 documents turned over by Mr. Mitchell to Defense Counsel by file-name
15 only. Any documents where the file-name itself is subject to some
16 privilege (work-product, attorney client, etc.) are exempt from this
17 requirement. Assuming Defendants meet both requirements, the Court
18 will grant the Defendants' Motion for a Protective Order Prohibiting
19 Further Electronic Discovery. However, Plaintiff may renew the request
20 for electronic discovery upon a showing of new evidence that
21 additional electronic discovery is likely to produce discoverable
22 information. Such a request will be subject to the Order on cost-
23 sharing described below.

24 2. Cost-Sharing

25 Because of the difficulty in extracting and searching for
26 electronic discovery, courts have developed a framework to evaluate

1 which party must bear the financial burden of electronic discovery.
2 See e.g. *Zubalake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003);
3 *Rowe Entertainment Inc. v. the William Morris Agency, Inc.*, 205 F.R.D.
4 421 (S.D.N.Y. 2002). *Zubalake* modified the framework set forth in
5 *William Morris*, resulting in the following eight-factor test:

- 6 1. The extent to which the request is specifically tailored
to discover relevant information;
- 7 2. The availability of such information from other sources;
- 8 3. The total cost of production, compared to the amount in
controversy;
- 9 4. The total cost of production, compared to the resources
available to each party;
- 10 5. The relative ability of each party to control costs and
its incentive to do so;
- 11 6. The importance of the issues at stake in the litigation;
and
- 12 7. The relative benefits to the parties of obtaining the
information.

13 *Zubalake*, 217 F.R.D. at 322.

14 According to the court in *Zubalake*, the first two factors are the
15 most important. *Id.* at 323. In addition, the court held that cost
16 shifting should occur in cases where the information is on a difficult
17 to retrieve medium, such as back-up tapes, or where fragmented files
18 must be searched. *Id.* at 324.

19 In the instant case, the first factor weighs in the Defendants'
20 favor. The parties have already formed an agreement specifically
21 tailored to discover relevant information and limited so as not to be
22 unduly burdensome. The information resulting from this search has been
23 produced to Plaintiff. The second factor is a toss up because
24 Plaintiff can depose employees to ask if certain files are on their
25 hard drive or inbox, but such requests might not be effective for
26 documents produced years ago. So far, total discovery costs are

1 \$33,000; Defendants have spent \$23,000 on an expert to conduct
2 discovery, and Plaintiff has spent \$10,000 to preserve the contents of
3 HAPO's hard drive. It follows that a significant amount of money has
4 been spent on discovery by the Defendants to date, and the third and
5 fourth factors weigh in the Defendants favor. Finally, the Plaintiff
6 is likely the only party to benefit from conducting a further search.
7 The Court finds that the majority of the factors weigh towards
8 requiring the Plaintiff to pay for electronic discovery requests.

9 A multi-factor analysis indicates that Plaintiff should finance
10 an future discovery. This is especially proper given that Plaintiff
11 wishes to search back-up tapes and for fragmented documents, two of
12 the key instances in which Zublake felt cost-shifting to be necessary.
13 Accordingly, the Court grants the Defendant's Motion for a Protective
14 Order Requiring Dowell to Bear the Cost of Future Electronic
15 Discovery, and if Plaintiff is able to meet the standard proscribed
16 above for future electronic discovery, the Court orders that Plaintiff
17 finance such discovery.

18 **3. Further Non-Electronic Discovery**

19 The Defendants seek to prohibit Dowell from seeking any further
20 non-electronic discovery given the 5000 documents already produced by
21 the Defendants. The Court finds any future requests to be unduly
22 burdensome in light of Defendants' past production, and grants the
23 Defendants' Motion for a Protective Order Baring any Future Non-
24 Electronic Discovery. However, Plaintiffs may seek further non-
25 electronic discovery based on a legitimate follow up to a deposition
26 or any of the newly discovered items.

1 **4. Arguing or Asserting Spoilation**

2 The Defendants argue Dowell's ongoing references to HAPO's
3 destruction of documents are unsubstantiated. However, given Danny
4 Mac's testimony, the court finds there to be a legitimate factual
5 dispute over whether some form of document manipulation occurred as a
6 result of Ms. Dowell's lawsuit. Accordingly, the Court denies
7 Defendants' Motion for a Protective Order Barring Dowell from Arguing
8 or Asserting that Defendants have spoiled evidence.

9 **IT IS HEREBY ORDERED** that Defendants' Motion for a Protective
10 Order, (Ct. Rec. 60), is **HELD IN ABEYANCE IN PART, GRANTED IN PART,**
11 **AND DENIED IN PART.** Specifically,

12 1. Defendants Motion for a Protective Order Barring any Future
13 Electronic Discovery is **HELD IN ABEYANCE** until Defendants:

14 a. File a Declaration with the Court explaining why searches for
15 the words "golf" and "tournament" were stopped prior to reaching
16 500 hits, and explaining why the "individual hits" instead of the
17 "hits within a document" definition of hits was used to exclude
18 these search terms; and

19 b. Produce to Plaintiff a list of all documents receiving hits in
20 Mr. Mitchell's May 1, 2005, search.

21 After such production, the Court will **GRANT** the Defendants' Motion for
22 a Protective Order Barring any Future Electronic Discovery. However,
23 Plaintiff may seek future discovery upon a showing that new evidence
24 indicates future discover is likely to lead to discoverable
25 information.

26 2. Defendants' Motion for a Protective Order Requiring Dowell to

1 Bear the Entire Cost of Further Electronic Discovery, if any, is
2 **GRANTED**. Therefore, Plaintiff may seek further electronic discovery if
3 (1) Plaintiff makes a showing that new evidence indicates future
4 discovery is likely to lead to discoverable information, and (2)
5 Plaintiff finances such discovery.

6 3. Defendants' Motion for a Protective Order Barring Dowell From
7 Making Further Non-Electronic Discovery Requests is **GRANTED**, absent
8 Plaintiff's legitimate follow-up question from a deposition or newly
9 produced discovery.

10 4. Defendants' Motion for a Protective Order Barring Dowell from
11 Arguing or Asserting that Defendants Have Spoiled Evidence is
12 **DENIED**.

13 **IT IS SO ORDERED**. The District Court Executive is directed to
14 enter this Order; and provide copies to all counsel.

15 **DATED** this 29th day of August 2005.

16
17 S/Edward F. Shea

18 EDWARD F. SHEA

19 United States District Judge
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